Jurisdictional Statement

No. 81-1834

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER STEVAS
CLERK

In the Supreme Court of the United States

October Term, 1981

BARTOW COUNTY BANK, ET. AL.,
Appellants,

vs.

BARTOW COUNTY BOARD OF
TAX ASSESSORS, ET. AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

(Counsel of Record for Appellant,
Bartow County Bank)
WM. MORGAN AKIN
Law Offices, Warren & Wm. Morgan Akin
P.O. Box 527
Cartersville, Georgia 30120
(404) 382-0780
Counsel of Record for Appellants,
Citizens and Southern Bank
of Bartow County, and
First National Bank of Cartersville

HERBERT M. CRANE, JR.
Crane, Jones & Cox, P.C.
13 South Erwin Street
Cartersville, Georgia 30120
(404) 382-0780

April 2, 1982

Tower Printing Company • 2 Peachtree St., NW • Suite 1414 • Atlanta, Georgia 30303 • (404) 659-4080

QUESTION PRESENTED

Whether Ga. Code Section 91A-3301, which provides for the taxation of bank shares based on the net worth of a bank without deducting the value of federal securities owned by the bank, is inconsistent with federal law prohibiting the direct or indirect taxation of federal securities, and thus violates the supremacy clause of the United States Constitution.

LIST OF ALL PARTIES

IN COMPLIANCE WITH RULE 28.1

Appellants

BARTOW COUNTY BANK, Appellant. A Georgia corporation which has no parent company, subsidiaries, or affiliates.

THE CITIZENS AND SOUTHERN BANK OF BARTOW COUNTY, Appellant. A Georgia corporation, which has no parent company, subsidiaries, or affiliates.

FIRST NATIONAL BANK OF CARTERSVILLE, Georgia, Appellant. A National Banking Association which at the outset of this litigation had no parent company, subsidiaries, or affiliates, but since September 1, 1981 has been a wholly owned subsidiary of Southeastern Bancshares, Inc., a Georgia corporation.

Appellees

Bartow County Board of Tax Assessors, Appellee.

W. E. Strickland, as Revenue Commissioner of the State of Georgia, Appellee.

TABLE OF CONTENTS

	Page
Question Presented	i
List of all Parties.	ii
Table of Contents.	iv
Table of Authorities	vi
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions involved	3
Statement of the Case.	6
The Question is Substantial. . . .	11
Conclusion	24
Appendices:	
Bartow County Bank, et.al. v Bartow County Board of Tax Assessors 248 Ga. 703, 285 S.E. 2d 920 (1982)	1a
Bartow County Board of Tax Assessors v Bartow County Bank, et.al. (Nos. 3080, 3081, & 3082, Super. Ct. Bartow Co., Ga. (May 27, 1981) .	31a
Decisions of Bartow Co. Board of Equalization, dated October 2, 1980.	55a

Notice of Appeal to the
Supreme Court of the
United States. 61a

Text of Ga. Code Ann.
Section 91A-3301 . . . . . 71a

TABLE OF AUTHORITIES

Cases	Page
American Bank and Trust Co. v Dallas County Petition for Certiorari filed ____ U.S.L.W. ____ (U.S. March 17, 1982) (No. 81-1717).	20
Bank of Texas v Childs 615 S.W. 2d 810 Petition for Certiorari filed sub. nom., ____ U.S.L.W. ____ (U.S. March 17, 1982) (No. 81-1717).	8
Bartow County Bank v Bartow County Board of Tax Assessors 248 Ga. 703, 285 S.E. 2d 920 (1982)	1
McCulloch v Maryland 17 U.S. (4 Wheat.) 316 (1819). .	12
Montana Bankers Ass'n v Montana Department of Revenue 177 Mont. 112, 580 p. 2d 909 (1978)	9,19
Society for Savings v Bowers 349 U.S. 143 (1955). . . .	throughout
Van Allen v Assessors 70 U.S. (3 Wall.) 573 (1866)	throughout
Weston v City Council of Charleston 27 U.S. (2 Pet.) 449 (1829). . .	12

TABLE OF AUTHORITIES - (Continued)

Statutes — Page

28 U.S.C. Section 1257(2) 2

31 U.S.C. Section 742 . . . . throughout

31 U.S.C.A. Section 742 13

R.S. Section 3701 4,13

Ga. Code Ann. Section 91A-3301. . . 4-5

Constitutions

U.S. Const. art I,
Section 8, Cl. 2. 12

U.S. Const. art VI, Cl. 2 3,12

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported as follows: Bartow County Bank vs Bartow County Board of Tax Assessors, 248 Ga. 703, 285 S.E. 2d 920 (1982). The opinion of the Superior Court of Bartow County, Georgia, is not reported; see pp. 31a thru 54a, infra.

JURISDICTION

The proceeding in the trial court questioned the constitutionality of a Georgia statute taxing bank shares. The trial court upheld the constitutionality of the Georgia taxing statute, and the Georgia Supreme Court affirmed by opinion entered January 6, 1982. Notice of Appeal was filed February 4, 1982. The jurisdiction of this Court is invoked under 28 USC Section 1257(2) because the validity of a Georgia statute is drawn in question on the ground of its being repugnant to the Constitution and laws of the United States, and the decision below was in favor of its validity.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., art. VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

31 U.S.C. Section 742

Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the

obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

R.S. Section 3701

All stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under State or municipal or local authority.

Ga. Code Ann. Section 91A-3301

Ga. Code Ann. Section 91A-3301, Ga. Laws 1978, pp 309, 523, is lengthy and its pertinent text is set forth in the Appendix at pp. 71a thru 78a, infra. Basically, it provides for banks to collect and pay a tax on bank shares

measured by corporate asset values, with deductions for real estate and other items, but with no deduction for the value of federal securities owned by the bank. (NOTE: Because of a recent general revision of the Georgia Code, this code section will, effective November 1, 1982, become Ga. Code Section 48-6-90 (1981).)

STATEMENT OF THE CASE

The question in this case is whether Georgia's bank share tax law, which provides for taxation of bank shares based on the net worth of a bank without any deduction for federal securities owned by the bank, is inconsistent with federal law prohibiting the direct or indirect taxation of federal securities. Although federal obligations and the interest thereon are exempt from state taxation, a narrow exception previously authorized state taxation of a shareholder's interest in a corporation measured by corporate asset values without a deduction for federal securities on the theory that the shareholder's interest in the corporation is a separate property interest from the corporation's ownership of assets. See Society for Savings v Bowers, 349 U.S. 143 (1955). The federal statute

exempting federal obligations from state taxation was amended in 1959, and the prohibition against any state taxation was strengthened.

The appellant banks timely filed with the proper local taxing authorities their 1980 "Determination of Taxable Value of Bank Shares" pursuant to the Georgia share tax statute. In addition to taking the allowable deductions provided under the Georgia taxing scheme, each appellant bank included as a deduction the net book value of bank-owned United States government securities. The Bartow County Board of Tax Assessors disallowed the deductions of federal obligations. On August 8, 1980, each appellant bank timely filed a notice of appeal to the Bartow County Board of Tax Equalization, contending that the federal securities held by the banks were exempt from

state taxation under federal law. Because different panels heard the cases, the untenable result at the Board of Equalization level was a decision in favor of Appellant Bartow County Bank but against the other two Appellant-banks.

The losing parties timely appealed the conflicting decisions of the Board of Tax Equalization to the Superior Court of Bartow County, Georgia, where all cases were consolidated and heard jointly, de novo. Against the objection of the banks, W.E. Strickland as Revenue Commissioner of the State of Georgia was allowed to intervene. After hearing argument and receiving briefs, the trial court issued an order May 22, 1981, entered May 27, 1981, ruling that the banks were not entitled to deduct the value of federal securities from net worth for purposes of determining net worth for

imposition of Georgia share taxes, and further holding that the Georgia share tax law was not unconstitutional. (See pp. 31a thru 54a, infra.) The banks then timely appealed to the Supreme Court of Georgia.

By opinion dated and entered January 6, 1982, the Supreme Court of Georgia held that Georgia's bank share tax statute is not in contravention of federal law and does not violate the supremacy clause of the U.S. Constitution. In so holding, the court followed Bank of Texas v Childs, 615 SW 2d 810 (Tex. Civ. App. 1981), and declined to follow Montana Bankers Ass'n v Montana Department of Revenue, 177 Mont. 112, 580 P. 2d 909 (1978).

The banks now appeal to the Supreme Court of the United States from the

decision of the Georgia Supreme Court affirming the trial court, and holding the Georgia share tax statute to be constitutional.

THE QUESTION IS SUBSTANTIAL

The question presented in this case is substantial for four reasons. First, the Georgia Supreme Court has upheld a Georgia statute which infringes on the borrowing power of the federal government. Second, the lower court's decision affects every bank in Georgia, and the question presented on appeal may affect every financial institution in the United States that owns or considers purchasing federal securities. Third, there has been a conflict among the states which have considered their bank share tax statutes in light of the question presented in this appeal. Montana has declared its bank share tax law unconstitutional; Georgia and Texas have upheld their taxing schemes. Finally, there has been no reasoned United States Supreme Court decision on point since the 1959

amendment which strengthened the law prohibiting the taxation of federal securities. All these reasons will be treated below.

The rule that obligations of the federal government are immune from state taxation was established in 1829. Weston v City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829). This rule is aimed at protecting the borrowing power of the United States from state encroachment, and was derived from the borrowing and supremacy clauses of the United States Constitution (Art. I, Section 8, Clause 2; Art. VI, Clause 2) and the constitutional doctrines announced in McCulloch v Maryland, 17 U.S. (4 Wheat.) 316 (1819). See Society for Savings v Bowers, 349 U.S. 143 (1955). The rule was embodied in a succession of federal statutes, then codified as Revised Statute Section 3701,

which reads as follows: "All stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority". RS Section 3701, 31 U.S.C.S. Section 742. The words "except as otherwise provided by law" were added by the revisors in the 1926 general revision of the U.S. Code. Thus, 31 U.S.C. Section 742, 31 U.S.C.A. Section 742 begins with those words, while R.S. Section 3701 and 31 U.S.C.S. Section 742 do not, since the words do not appear in the statutes at large and since Title 31 has not been enacted into positive law.

As well as prohibiting direct taxation of federal securities, the rule was extended to embrace indirect taxation of such obligations through their inclusion in a tax imposed on all the

property of a taxpayer. Bowers, at 144. Thus, under this extension of the rule, a corporation could not be taxed on its net worth if its assets included federal obligations; to make such a tax permissible, the federal obligations must first be deducted.

However, there was one narrow exception to the general rule. We will refer to this exception as the "Van Allen rule" because it originated with Van Allen v Assessors, 70 U.S. (3 Wall.) 573 (1866). The "Van Allen rule" as it developed over the years is well described in the case of Society for Savings v Bowers, 349 U.S. 143 (1955) as follows:

> It has been held that a state may impose a tax upon the stockholder's interest in a corporation, measured by corporate asset values, without making any deduction on account of United States securities held by the corporation. This doctrine had its origin in cases involving national bank stock. There, Congressional

> consent to state taxation of the stock of national banks, upon certain conditions, was held, over strong dissent, to permit such taxes to be assessed without the exclusion of federal obligations owned by the banks. . . . This result was reached in part on the theory that the stockholder's interests in a corporation represent a separate property interest from a corporation's ownership of its assets, so that a tax on the stockholder's interest is not a tax on the federal obligations which are included in the corporate property. This rationale has been carried over to cases involving stock of state-created banks, and thus a tax on their shareholders, though measured by corporate assets which include federal obligations, is held not to offend the rule immunizing such obligations from state taxation. . . . Further, in levying a tax on shareholders, a state may require its payment by the corporation, as a collecting agent. . . . The result is that when, as is usually the case, the shareholder tax is measured solely by corporate asset values, such a tax is difficult to distinguish from a tax imposed on the corporation itself, so far as the practical impact of the two types of taxes upon corporate owned federal obligations is concerned. Nevertheless, this exception to the general rule of immunity is firmly imbedded in the law. Bowers, at 147-48. (Citations omitted)

Thus at the time of the Bowers decision,

before the 1959 amendment, the statute prohibited taxes upon federal obligations. The Supreme Court in Van Allen and its progeny allowed share taxation on the theory that the stockholder's interest in a corporation was a separate property interest from a corporation's ownership of its assets; thus a tax on the stockholder's interest was not a tax on the federal obligations included in the corporate property. This fiction began with Van Allen and by the time of Bowers was "firmly imbedded in the law." Bowers, at 148. That the Van Allen rule is "a fiction" was noted by the Bowers court when it pointed out that when "the shareholder tax is measured solely by corporate asset values, such a tax is difficult to distinguish from a tax imposed on a corporation itself, so far as the practical impact of the two types of

taxes upon corporate owned federal obligations is concerned." Id.

In 1959, RS Section 3701 was amended by the addition of a second sentence, with the statute as amended reading as follows:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed upon corporations and except estate taxes or inheritance taxes. 31 U.S.C.S Section 742.

The effect of this amendment upon taxation of federal obligations is clear.

What was the effect of the 1959 amendment? Section 742 had previously prohibited taxes upon federal securities. Now, the exemption was extended to every

form of taxation that required either the obligations or interest thereon or both to be considered, directly or indirectly, in the computation of the tax. Thus, taxing schemes permissible prior to 1959 were now prohibited if the schemes considered, directly or indirectly, such obligations in the computation of the tax. It is obvious that the Georgia law "considers" federal obligations in the computation of the tax. See pp. 71a thru 78a, infra.

It is undisputed that the rule that obligations of the federal government are immune from state taxation was aimed at protecting the borrowing power of the United States from state encroachment. Any exception to this rule, since it would constitute an infringement of the borrowing power of the United States, would alone be enough to make the

question in this appeal substantial. The impact of this infringement becomes more obvious when one realizes that the Georgia decision affects every financial institution in the state which owns federal securities; and if that decision is not reversed, every financial institution in any state with a share tax may be affected.

Another reason the question is substantial is that there is a conflict among the states which have decided the question involved in this appeal. While Georgia and Texas have upheld bank share taxes, the Montana Supreme Court has held its state's share tax scheme, which is similar to Georgia's, to be unconstitutional unless construed as permitting a deduction for federal obligations. See Montana Bankers Ass'n v Montana Department of Revenue, 177 Mont. 112, 580 P.

2d 909 (1978). The Montana Court found the language of the 1959 amendment to be "clear, unambigious, direct, and certain." In refusing to apply the Van Allen rule, the Court found that "the meaning of the statute is clear from its language," and thus there was no need to resort to rules of statutory construction.

The question involved is obviously substantial where states have rendered conflicting judgments, and the United States Supreme Court needs to resolve the dispute. While the Montana case was not brought to this Court, the Texas banks now have a petition for a writ of certiorari pending before this Court as American Bank and Trust Co. v Dallas County, No. 81-1717, dated March 17, 1982. The question in the Texas case is almost identical to the one presented in

this appeal.

Finally, the question is substantial because there has been no decision by the Supreme Court on point since the 1959 amendment. Further, it is apparent from the leading decision shortly before the 1959 amendment that the Court was questioning the Van Allen rule at the time. Justice Harlan found that the Van Allen rule was "firmly imbedded in the law" in 1955. Bowers, at 148. However, the Bowers Court knew that the Van Allen rule is "a fiction" when it pointed out that when "the shareholder tax is measured solely by corporate asset values, such a tax is difficult to distinguish from a tax imposed on a corporation itself, so far as the practical impact of the two types of taxes upon corporate-owned federal obligations is concerned." Id. Thus, not only has there been no

Supreme Court decision on point since the 1959 amendment, but also the Van Allen rule itself was being questioned by the Supreme Court immediately before the 1959 amendment.

In summary, the Van Allen rule has not been judicially passed on since the statute prohibiting state taxation of federal obligations was strengthened in 1959. The question has a substantial impact on the borrowing power of the federal government, and may affect every financial institution in states with a share tax. The states which have decided the question have reached conflicting results, and a petition for certiorari is now before this Court from Texas. Since the plain meaning of the 1959 amendment prohibits every form of state taxation that requires the United States obligations or interest to be considered directly or

indirectly in the computation of the tax, the federal statute clearly and on its face prohibits share tax schemes such as Georgia's. For this reason, the Court should consider summary reversal. In the alternative, probable jurisdiction should be noted.

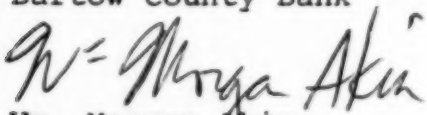
CONCLUSION

The language of the 1959 amendment to Section 742 is clear, unambiguous, direct, and certain; thus, the Court may wish to consider summary reversal. Otherwise, probable jurisdiction should be noted.

RESPECTFULLY SUBMITTED,

Counsel of Record for Appellant

Bartow County Bank



Wm. Morgan Akin

Law Offices, Warren & Wm. Morgan Akin

P.O. Box 527

Cartersville, Georgia 30120

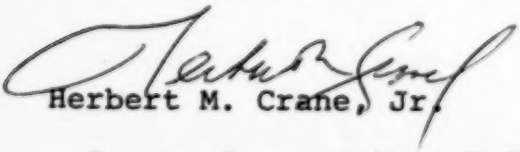
(404)382-0780

Counsel of Record for Appellants

Citizens and Southern Bank

of Bartow County, and

First National Bank of Cartersville



Herbert M. Crane, Jr.

Crane, Jones & Cox, P.C.

13 South Erwin Street

Cartersville, Georgia 30120

(404)382-3737

In the Supreme Court of Georgia

Decided: Jan 6, 1982

37868. BARTOW COUNTY BANK v. BARTOW BOARD OF TAX ASSESSORS et al.

37869. THE CITIZENS & SOUTHERN BANK OF BARTOW COUNTY v. BARTOW COUNTY BOARD OF TAX ASSESSORS, et al.

37870. FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA v. BARTOW COUNTY BOARD OF TAX ASSESSORS et al.

HILL, Presiding Justice.

This appeal raises the question of whether Georgia's bank share tax violates the supremacy clauses of the U. S. and Georgia Constitutions. U. S. Const. Art. VI, Cl. 2 (Code Ann. § 1-602); Ga. Const. Art. XI, Section I, Par. I (Code Ann. § 2-6801).

The question has its origin in McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819), where the Supreme Court in the landmark opinion by Chief Justice

John Marshall held a state tax on notes issued by a branch of the Bank of the United States to be unconstitutional, saying [4 Wheat. (17 U.S.) at 436]: "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."

As a historical consequence of the freedom of national banks from state taxation, national banks (and to make them competitive, state banks) in Georgia pay no income taxes, pay no tangible or intangible property taxes, and pay no franchise or business license taxes. [1/] Banks are taxed on their real property

real estate and transfers and sales and uses, and their stockholders are taxed on the bank's shares. It is the bank share tax which is in issue here.

The validity of a bank share tax, if not discriminatory against national banks, was upheld in Van Allen v. The Assessors, 3 Wall. (70 U.S.) 573 (1865). Our bank share tax is a tax, remitted by the Bank, imposed on the value of the shares of a bank issued to its stockholders, which value includes the bank's investment in stocks and bonds of the United States. Daniel v. Bank of Clayton County, 154 Ga. 282 (1) (114 SE2d 210) (1922).

Georgia's bank share tax at present reads in pertinent part as follows, Code Ann. § 91A-3301, Ga. L. 1978, pp. 309, 523: "(a)(1) No tax shall be assessed upon the capital banks or banking associations organized under the authority of

of this State or of the United States located within this State, but the shares of the stockholders of the banks or banking associations, whether resident or nonresident owners, shall be returned and taxed at their fair market value which is hereby fixed and shall be determined by adding together the amount of the capital stock, paid-in capital, appropriated retained earnings, and retained earnings as defined in the Financial Institutions Code of Georgia (Title 41A) and as shown on the unconsolidated statement of condition of the bank or banking association as of January 1 next preceding the date of making the return as required in this section and dividing the result by the number of outstanding shares, at the same rate provided by law for the taxation of tangible personal property in the hands of private individuals."

Thus the tax is upon the bank's shareholders rather than the bank itself, although the value of those shares is based upon the capital (net worth) of the bank.

The act authorizes as deductions from the fair market value of the shares (net worth of the bank) real estate taxed separately, investments in subsidiary banks taxed under the act, undistributed earnings of other subsidiaries subject to Georgia corporate taxes and reasonable capital reserves. Code Ann. § 91A-3301(a) (2). The act does not provide for deduction of U. S. government securities.

The Bartow County Bank, a state bank, filed with the local taxing authorities its 1980 "Determination of Taxable Value of Bank Shares". This return showed a total capital

or net worth of $902,243.85 and total deductions of $950,548.21, which reduced the taxable value of the bank's shares to zero. In making the deductions, the bank included as a deduction the net book value of bank-owned U.S. government securities in the sum of $543,800.92. The Bartow County Board of Tax Assessors disallowed this deduction and determined that the taxable value of the bank's shares therefore was $495,496.56. The bank appealed to the Bartow County Board of Tax Equalization, contending that the federal securities held by the bank were exempt from state taxation under federal law. The Board of Equalization ruled in favor of the bank, the majority of the Board finding that federal securities are not taxable. The Bartow County Board of Tax Assessors appealed the decision of the Board of Equalization to the Superior

Court of Bartow County.

The C&S Bank of Bartow County, a state bank, and the First National Bank of Cartersville, a national bank, had also filed 1980 returns deducting the value of federal securities, which deductions reduced the value of C&S bank shares to zero and reduced the value of First National bank shares to $557,187. These deductions were disallowed by the Bartow County Board of Tax Assessors and these two banks also appealed to the Board of Equalization but because different panels heard the cases, the untenable result of the Board of Equalization level was a decision in favor of the Bartow County Bank but against the other two banks. [2/] The other two banks appealed to the Superior Court of Bartow County, where all three cases were consolidated

and heard jointly.

The State Revenue Commissioner then moved, and over the banks' objections was allowed, to intervene. The trial judge issued a lengthy order reviewing the authorities, finding that the share tax act is not unconstitutional and concluding that the banks were not entitled to deduct the value of federal securities in determining net worth for imposition of share tax. The banks appeal.

1. The principal issue in this case is the constitutionality of Georgia's bank share tax act, Code Ann. § 91A-3301; Ga. L. 1978, pp. 309, 523, supra, which provides for taxation of bank shares held by stockholders based on the net worth of a bank without subtracting the value of federal securities owned by the Bank. The banks contend that the bank share tax

is in contravention of 31 USCA § 742, as amended by Pub. L. 86-346, and therefore violates the supremacy clauses of the United States Constitution and the Constitution of the State of Georgia. U. S. Const. Art. VI, Cl. 2 (Code Ann. § 1-602); Ga. Const. Art. XI, Sec. I, Par. I (Code Ann. § 2-6801). 3/

The banks contend that the tax act should be declared unconstitutional in its entirety, or that this court could render the statute constitutional by allowing banks to deduct the value of the U. S. obligations owned by the banks. 4/ The Revenue Commissioner contends that the banks are seeking to obtain a double or duplicative exemption. The Commissioner argues that the shares of a bank with $1 million in capital and $1 million in deposits which loans its capital to private enterprises and

purchases federal securities with the money on deposit would, if the bank's position were valid, not be subject to the tax because the federal securities would be offset against the bank's capital of $1 million which would otherwise be taxable.

As noted above, the banks contend that the share tax act violates federal law and thereby violates the supremacy clause of the Constitution. Our review involves two federal laws, 12 USC § 548 and 31 USC § 742, and their predecessors. But our first inquiry is as to the cases which were the progeny of McCulloch v. Maryland, supra.

In Osborn v. President, Directors and Company of the Bank of the United States, 9 Wheat, (22 U.S.) 738, 868 (1824), also written by Marshall, C.J., the Court declined to overrule McCulloch

v. Maryland, supra, and held a state statute levying a tax on the Bank of the United States, a federal instrumentality, to be unconstitutional.

In Weston v. City Council of Charleston, 2 Peters (27 U. S.) 449, 469 (1829), again written by Marshall, C.J., the Court applied McCulloch v. Maryland and held a city ordinance which levied a personal property tax on bonds, notes, insurance stock, and stock issued by the United States, to be invalid as to stock of the United States.

In Bank of Commerce v. The Commissioners of Taxes of the City and County of New York, 2 Black (67 U.S.) 620 (1862) in an opinion written by Nelson, J., the Court applied Weston v. City of Charleston, supra, and held that a state tax could not be imposed on the value of the capital of a state bank which consisted

partially or entirely of a stock of the United States.

In the Bank Tax Case, 2 Wallace (69 U. S.) 200 (1864), also written by Nelson, J., the Court held that the New York legislature could not avoid Bank of Commerce v. The Commissioners of Taxes of the City and County of New York, supra, by imposing the tax "on a valuation equal to" the amount of the bank's capital stock, as opposed to the tax on the actual value of the capital stock held invalid in Bank of Commerce.

In 1862, Congress authorized the Secretary of the Treasury to issue notes and bonds, and provided that ". . . all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations, within the United States, shall be exempt from taxation by or under state authority."

Act Feb. 25, 1862, c. 33, § 2, 12 Stat. 346. It was this act which was the forerunner of 31 USC § 742 and it was this act which was referred to by the Reporter in Van Allen v. The Assessors, 3 Wall. (70 U.S.) 573, 578, 579 (1865). At issue directly in Van Allen was § 41 of the National Bank Act, Act June 3, 1864, c. 106, 23 Stat. 111, which is the predecessor of 12 USC § 548, also involved in the case before us.

The National Bank act provided for the organization of national banking associations and required that at least one-third of the capital of a national bank be invested in bonds of the United States. Section 41 of that act (as amended in 1864) provided, among other things, that the act was not to be construed to prevent "all the <u>shares</u> in any of the said associations, held by

any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority . . ." Act June 3, 1864, c. 106, 13 Stat. 111. (Emphasis supplied.) New York promptly enacted a bank share tax. [5/] Van Allen was a shareholder in the First National Bank of Albany and all of the capital of that bank was invested in obligations of the federal government.

In Van Allen v. Assessors, 3 Wall. (70 U. S.) 573 (1865), the majority opinion was written by Justice Nelson, who authoreded Bank of Commerce v. The Commissioners of Taxes of the City and County of New York and the Bank Tax Case, supra. The principal question decided was ". . . whether the State possesses the power to authorize the taxation of the

shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States?" (at p. 582). The majority found the previous bank cases (holding unconstitutional state taxes on bonds of the United States which constitute the capital of a bank) not applicable (at p. 583). The majority found that no question as to the pledged faith of the government was involved, that the authority of the states, under the act of Congress, to tax the shares was a condition on the exercise of the rights and privileges conferred on national banking associations, and that the tax on the shares was not a tax on the captial of the bank invested in government securities because the corporation, not its shareholders, owned the assets of the bank (at pp. 583-584). The

majority held that the state bank share tax was not unconstitutional by reason of the fact that the capital of the bank was invested in federal securities. The Court did find, however, that the New York share tax was defective in that it was imposed on shares of national banks whereas the tax on the capital of state banks necessarily exempted bonds of the United States. The Court noted that this defect could be readily remedied by the state legislatures (at p. 581) [thereby leading to state share taxes on both national and state banks].

Chief Justice Chase and Justices Wayne and Swayne dissented, saying that the tax was an indirect tax on bonds of the United States, that McCulloch v. Maryland and its progency cited above should be applied, and that Congress did not intend by authorizing the share tax

to include federal obligations.

In People v. The Commissioners, 4 Wall. (71 U. S.) 244 (1866), New York's revised bank share tax applicable to both state and national banks was upheld, with Chase, C.J., and Wayne and Swayne, JJ., dissenting.

In 1868 Congress amended the share tax provision of § 41 of the National Bank Act to provide, among other things, that ". . . the legislature of each State may determine and direct the manner and place of taxing all the shares of national banks located within said State. . . " Act Feb. 10, 1868, c. 7, 15 Stat. 34. The amendment did not exempt obligations of the United States from the share tax. That apparently ended the dispute as to the validity of the inclusion of federal securities in the share tax because in

National Bank v. Commonwealth, 9 Wall. (76 U.S.) 353 (1869), the Court in a unanimous opinion which was joined by Chase, C.J., and Swayne, J., reaffirmed the right of the states to tax bank shares even though all the bank's capital be invested in federal securities.

In 1878, when the statues were revised, the law stood as follows: The Act of Feb. 24, 1862, c. 33, s. 2, 12 Stat. 345, and its progeny read: "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." R. S. § 3701 (this provision will be identified as "the exemption"). The bank share tax provision as to national banks read: "Nothing herein shall prevent all the shares in any associ-

ation from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State . . ." R. S. § 5219 (this provision will be identified as "the authorization").

Although the tax exemption provision had been in effect when Van Allen was decided, the opinion of the Court itself did not refer to that exemption. In Cleveland Trust Co. v. Lander, 184 U. S. 111 (22 SC 394, 46 LE 456) (1902), the trust company deducted the value of its bonds of the United States in declaring the share tax authorized by R. S. §

5219, claiming under the exemption of R. S. § 3701. The Court found against the trust company, saying (184 U. S. at 115): "The answer to the contention is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by this Court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statues of the United States (section 5219) by another (section 3701), between which there is no want of harmony."

In Des Moines Bank v. Fairweather, 263 U. S. 103, 114 (44 SC 23, 68 LE 191) 1923), the Court referred to the Van Allen ruling, saying it "is now settled law in this court" (citations omitted). In Society for Savings in the City of Cleveland v. Bowers, 349 U. S. 143, 148 (75 SC 607, 99 LE 950) (1955), after

referring to the exemption recognized by R.S. § 3701, 31 USC § 742, the Court cited Van Allen and subsequent cases, saying " . . . this exception to the general rule of immunity is firmly embedded in the law."

In the case now before us, the banks contend that the exemption of R.S. § 3701, 31 USC § 742, was extended so as to overrule Van Allen, when the exemption was amended in 1959 by addition of the following: "This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." 31 USC § 742, as

amended by Pub. L. 86-346.

However, in 1959 when the exemption was amended, R.S. § 5219, 12 USC § 548, expressly authorized the bank share tax, which included the value of U. S. obligations. We can say with confidence that had this case arisen before the authorization of 12 USC § 548 was amended in 1969, the Supreme Court of the United States would have said: The answer to the banks' contention is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by the Court, of the bank and its shareholders, and seeks to nullify one provision of the statutes (R.S. § 5219; 12 USC § 548) by another (R.S. § 3701; 31 USC 742), between which there is no want of harmony. Cleveland Trust Co. V. Lander, supra, 184 U. S. at 115.

The share tax authorization, 12 USC § 548, was amended in 1969 to provide simply: "For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." Pub. L. 91-156. This amendment was intended to allow the states to tax national banks like state banks, rather than to prescribe how states could tax national banks (and state banks as well). This amendment does not prohibit bank share taxes. Bank of Texas v. Childs, 615 SW2d 810, 824-826 (Tex. Civ. App. 1981).

Since 1959, the exemption of 31 USC § 742 has read: "Except as otherwise provided by law, all stocks, bonds,

Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." 6/

The banks argue that this amendment was intended to extend the exemption allowed owners of government securities to shareholders of corporations owning government securities because the share tax requires that government obligations be "considered", directly or indirectly, in the computation of the tax. The

banks then argue that the first rule of statutory construction is to consider the text of the law and if the text is clear, then there is no need for constuction. This overlooks the cardinal rule of statutory interpretation which is to ascertain the intent of the legislative body and when that intent is clear, to carry it into effect even though seemingly contrary to the literal sense of the terms. Thacker v. Morris, 196 Ga. 167, 173 (26 SE2d 329) (1943). The federal rule is the same. U. S. v. Amer. Trucking Ass'ns, 310 U. S. 534, 542-544 (1940).

Was it the intent of Congress in enacting the 1959 amendment to the exemption of 31 USC § 742 to undo the balance finally achieved between state and national banks? Was it the intent of Congress to overrule Van Allen and 94

years of "settled law", Des Moines Bank v. Fairweather, supra, 263 U. S. 103, 114? Was it the intent of Congress to repeal an exemption which has become "firmly embedded in our law", Society for Savings in the City of Cleveland v. Bowers, supra, 349 U.S. 143? We find that the existence from 1959 to 1969 of the exemption of R.S. § 3701, 31 USC § 742 as amended in 1959, side by side with the share tax authorization of R.S. § 5219, 12 USC § 548 (before the 1969 amendment), shows that Congress did not intend in 1959 to repeal the share tax authorization, including the value of government securities owned by the corporation. We agree with the reasoned conclusion of the trial judge in this case: "This court does not believe the Congress of the United States would sweep away the Van Allen rule and the

bank share tax system of the various states without making a clear statement of its intention to do so." [7] This conclusion is reinforced by the legislative history of the 1959 amendment to the exemption, 31 USC § 742, as well as the 1969 amendment to the tax authorization, 12 USC § 548. [8]

We therefore hold that Georgia's bank share tax act, Code Ann. § 91A-3301, Ga. L. 1978, pp. 309, 523, which provides for taxation of bank shares based on the net worth of the bank with-subtracting the value of federal securities owned by the bank, is not in contravention of 31 USC § 742 as amended in 1959 by Pub. L. 86-346, and does not violate the supremacy clause of the U. S. and Georgia Constitutions. In so doing, we follow Bank of Texas v. Childs, 615 SW2d 810 (Tex. Civ. App. 1981), and de-

cline to follow Montana Bankers Asso. v. Montana Dept. of Revenue, 580 P2d 909 (Mont. S. Ct. 1978).

2. The trial court did not abuse discretion in allowing the State Revenue Commissioner to intervene under Code Ann. § 81A-124(b).

3. The remaining arguments advanced by the banks and by amicus curiae comprise constitutional attacks on Code Ann. § 91A-3301 (a)(1) that were not raised in the superior court or were not enumerated as error, and therefore are not cognizable on this appeal.

Judgment affirmed. All the Justices concur, except Marshall, J., not participating.

FOOTNOTES

/1/ Code Ann. §§ 91A-3301(d)(g), 91A-3303, 91A-3306. These exemptions from taxation were mandated by federal law up until 1969. See 12 USC § 548, as amended. See also C&S Nat. Bank v. Fulton County, 245 Ga. 441 (265 SE2d 559) (1980).

/2/ Apparently the panels differed because certain Board members were disqualified in certain cases.

/3/ We perceive no meaningful difference between the U. S. and Georgia Constitutions. The U. S. Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Georgia Constitution provides: "The laws of general operation in this State are, first: As the Supreme law: The constitution of the United States, the laws of the United States in pursuance thereof. . . . "

/4/ Holding the act unconstitutional in its entirety might subject the banks to income and tangible property taxes, among others. See Code Ann. § 91A-3301(d) (g).

/5/ Georgia enacted its first bank share tax in 1876. Ga. L. 1876, pp. 134, 136.

/6/ The banks insist that since the introductory clause, "Except as otherwise provided by law," does not appear in Revised Statute § 3701 but was, instead, inserted by the codifiers of the 1926 Code, and since this section of the United States Code has not been enacted into positive law, the clause is not part of the statute. The Revenue Commissiner points out that the Supreme Court has cited 31 USC § 742, including the words "Except as otherwise provided by law", Society for Savings in the City of Cleveland v. Bowers, 349 U. S. 143, 144 (75 SC 607, 99 LE 950) (1955), and argues that these words should be given force and effect. We find it unnecessary to resolve the question because we reach the same result whether or not this statute is introduced by the "Except . . ." clause. The two provisions in this issue here are in harmony, Cleveland Trust Co. v. Lander, supra, and thus there is no repeal by implication. Since here we quote USC, we include the clause in the quotation.

/7/ Such wide-reaching changes as the bank urge here may be accompanied by delayed effectiveness and transistion provisions. See 1969 U. S. Code Cong. & Ad. News Pt. 2, pp. 1594, 1597.

/8/ The legislative history of the 1959 amendment to the exemption, 31 USC § 742, shows that its purpose was to exempt income on federal obligations from the computation of gross income in state income taxes imposed by one state. 1959 U.S. Code Cong. & Ad. News, pp. 2769, 2773.

In the Superior Court of Bartow County, State of Georgia

Bartow County Board of Tax Assessors, et, al Appellant v. Bartow County Bank, Appellee Civil Action No. 3080

Citizens & Southern Bank of Bartow County, Appellant v. Bartow County Board of Tax Assessors, et al, Appellee, Civil Action No. 3081

First National Bank of Cartersville, Georgia, Appellant v. Bartow County Board of Tax Assessors, et al, Appellee Civil Action No. 3082

The above styled cases having come on regularly before the Court for hearing, all parties being represented by counsel and all parties stipulating that the cases involve only questions of law, the facts being agreed upon, the Court finds as follows:

FINDINGS OF FACT

1.

Case No. 3080

In 1980, the Bartow County Bank filed a form with the Tax Assessors of Bartow County for determination of the taxable value of the Bank's shares of capital stock. In this return the Bank deducted the net book value of Bank owned United States Government Securities in the sum of $543,800.92 which reduced the taxable value of the Bank's shares to zero. The Bartow County Board of Tax Assessors disallowed this deduction and determined that the taxable value of Bank's shares was $495,496.46. On August 8, 1980, the Bank filed a notice of appeal to the Bartow County Board of Tax Equalization contending that the federal securities held by the Bank were exempt from state taxation pursuant to 31 U.S.C. §

742(1979) (R.S.3701) and P.L. 86-346. On October 2, 1980, the Tax Equalization Board in a vote of 2 to 1 found that the federal securities "are not taxable". On October 27, 1980, the Bartow County Board of Tax Assessors appealed the decision of the Equalization Board to this Court.

Case No. 3081

In 1980, the Citizens and Southern Bank of Bartow County (hereinafter "C&S") filed a form with the Tax Assessors of Bartow County for a determination of the taxable value of C & S shares of capital stock. In this return C & S Deducted the net book value of Bank owned United States Government Securities in the sum of $1,995,393 which reduced the taxable value of the Bank's shares to zero. The Bartow County Board of Tax Assessors disallowed this deduction and determined that the taxable value of C & S's shares

was $719,742. On August 8, 1980, C & S filed a notice of appeal to the Board of Tax Equalization contending that the federal securities held by C & S were exempt from State taxation pursuant to 31 U. S. Code §742. On October 2, 1980, the Tax Equalization Board in a vote of 2 to 1 found that the federal securities "are taxable." On October 22, 1980, C & S appealed the decision of the Equalization Board to this Court.

Case No. 3082

On April 6, 1980, the First National Bank of Cartersville (hereinafter "First National") filed a form with the Tax Assessors of Bartow County (amended return) for a determination of the taxable value of First National's shares of capital stock. In this return First National deducted the net book value of Bank owned United States Government

in the sum of $4,171,240 which reduced the taxable value of First National's shares to zero. The Bartow County Board of Tax Assessors disallowed this deduction and determined that the return value of First National's shares was $557,187 and that the current value was $4,748,427. On August 9, 1980, First National filed a notice of appeal to the Board of Tax Equalization contending that the federal securities held by First National were exempt from state taxation pursuant to 31 U.S. Code § 742. On October 2, 1980, the Tax Equalization Board in a vote of 2 to 1 found that the federal securities "are taxable". On October 22, 1980, First National appealed the decision of the Tax Equalization Board to this Court.

It should be pointed out that the apparent difference in decisions came about because of different personnel

serving on the Tax Equalization Board serving he various cases.

Subsequently the State Revenue Commissioner of the State of Georgia was allowed to intervene in the three cases.

2.

The single issue for decision is whether Georgia Code Section 91A-3301 (the Georgia Bank Shares Taxing Statute) in providing for the taxation of bank shares based on the net worth of a bank without subtracting the value of federal securities owned by the bank is inconsistent with federal law prohibiting the direct or indirect taxation of federal securities, and therefore violates the supremacy clauses of the United States and Georgia Constitutions, Georgia Code Annotated Section 1-602, 2-6801.

CONCLUSIONS OF LAW

1.

Section 91A-3301 (a)(1) of the Georgia Code Annotated (Ga. Laws 1978, pp. 309, 523, eff. Jan. 1, 1980) provides:

> No tax shall be assessed upon the capital of banks or banking associations organized under the authority of this State or of the United States located within this State, but the shares of the stockholders of the banks or banking association, whether resident or nonresident owners, shall be returned and taxed at their fair market value which is hereby fixed and shall be determined by adding together the amount of the capital stock, paid-in capital, appropriated retained earnings, and retained earnings as defined in the Financial Institutions Code of Georgia (Title 41A) and as shown on the unconsolidated statement of condition of the bank or banking association as of

January 1 next preceding the date of making the return as required in this section and dividing the result by the number of outstanding shares, at the same rate provided by law for the taxation of tangible personal property in the hands of private individuals.

2.

31 U. S. Code 742 provides:

> Except as otherwise provided by law all stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local athority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes. (R.S. § 3701; Sept. 22, 1959, P. L. 86-346, Title I, §106 (a), 73 Stat. 622).

The Act of Sept. 22, 1959, inserted the last sentence. The First sentence was

derived from a series of banking and currency acts beginning with Acts. Feb. 25, 1862, ch. 33§2,12 Stat. 346. The revised statute does not contain the first clause of the first sentence which is "Except as otherwise provided by law." This Court does not believe that this "Except" clause is significant in this case because the statute has been interpreted many times prior to the enactment of the United States Code in 1926 and given the same interpretation as after the enactment of the United States Code.

3.

12 U. S. Code 548 provides:

> For the purpose of any tax law enacted under authority of the United States or any State, a national Bank shall be treated as a bank organized and existing

> under the laws of the State or other jurisdiction within which its principal office is located. (U.S. Amended Dec. 4, 1969, P.L. 91-156, § 2(a), 83 Stat. 434.)

The predecessor to 12 U. S. Code 548 which was extant in 1959 when the second sentence of 31 U.S. Code 742 was added provided in part:

> The Legislature of each State may determine and direct subject to the provisions of this section the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or . . .

This statute was derived from R. S. 5219 and from Act June 3, 1864, C. 106, § 41,13 Stat. 111, designated the National Bank Act. For the history of this statute see Agricultural National Bank V. Tax Commission, 392 U. S. 339, 20 LEd 2d

1138, 88S ct. 2173(1968) (after reading this case one can understand why the statute was amended the following year in 1969.) Section 41 of the National Bank Act of 1864 is the statute construed in Van Allen v. The Assessors 70 U. S. 573, 18 LEd. 229 (1866).

4.

In McColloch v. Maryland 4 Wheat. 316, 4 LEd 579 the Supreme Court declared unconstitutional a state tax on the Bank of the United States. A line of cases established that the States are without power to tax a national bank unless authorized by Congress. Congress authorized State taxation of national banks in one of four ways specified in 12 U.S. Code 548, one of which was taxation of the shares of a national bank.

5.

In 1829 the Supreme Court held that the obligations of the Federal Government are immune from State taxation. Weston v. Charleston, 2 Peters 449, 7 LEd 481. The rule was embodied in RS 3701, 31 U.S. Code § 742.

6.

The two rules came in conflict in Van Allen v. The Assessors 70 U.S. 573, 18 LEd. 233 (1866) where the Court stated the issue as follows:

> Whether the State possesses the power to authorize the taxation of the shares of these National Banks in the hands of stockholders, whose capital is wholly vested in stocks and bonds of the United States?

The Supreme Court answered, yes. The Court distinguished between a tax on the assets of the bank and a tax on

the shareholders of the bank. As the Court saw it the corporation was the legal owner of the assets of the Bank and not the shareholders. (In the Society for Savings v. Bowers, 349 U.S. 143 At. 148, 99 LEd 950 at 957, 75 S Ct. 607 (1955) Justice Harlan found it hard to make this distinction so far as practical impact was concerned.) The Court found that in § 41 of the National Bank Act (predecessor to 12 U.S. Code 548) Congress had specifically authorized State taxation of shares of stock in a national bank. The Van Allen case held, over strong dissent, that Congressional consent to State taxation of the stock of National Banks, upon certain conditions permitted such taxes to be assessed without the exclusion of federal obligations owned by the banks.

In Cleveland Trust Co. v. Lander, 184 U.S. 111, 46 LEd 456, 22 S. Ct. 394 (1902) the Supreme Court held that a tax on shareholders of state created banks, though measured by the assets of the bank which included federal obligations did not offend the rule immunizing such obligations from State taxation, Society for Savings v. Bowers, 394 U.S. 143.

In the Bowers case Justice Harlan struggled with the problem of form over substance and tried to determine the "true nature of this tax in terms of the rights and liabilities which the statute, as construed creates." The Court could find no right or reimbursement in the bank against the depositors (the case involved mutual savings banks having no capital stock or shareholders) for taxes paid on

behalf of the depositors. Justice Harlan conceded that where the tax paid is less than the interest the bank contemplates paying the depositors no such right of reimbursement is necessary because there is in effect an internal accounting set off before any dividend is paid.

In Georgia, however, should the tax exceed any amounts due the shareholder there is a common law right of reimbursement. Daniel v. Bank of Clayton County 154 Ga. 282 (1922) states, ". . . according to the decisions of this Court, the corporation would have a common law right to reimbursement against the stockholders for taxes paid out on account of their shares of stock. Georgia State B.& L. Association v. Savannah, 109 Ga. 63."

In the opinion of this Court this case turns on the question of whether P.L. 86-346, Sept. 22, 1959, the second sentence of 31 U.S. Code § 742 was intended by Congress to reverse the Van Allen rule.

In all probability this case would not have been brought were it not for P.L. 86-346, the 1959 amendment to 31 U.S. Code § 742.

The first sentence of 31 U.S. Code 742 existed at the time of the Van Allen case in 1866 and continued in the law as all of the subsequent cases along this line were decided by the Supreme Court. This exception to the general rule of immunity became "firmly embedded in the law." Society of Savings v. Bowers, 349 U.S. 143 (1955). A number of states have relied on the Van Allen rule over the years and enacted bank

share tax laws which do not exempt federal securities. The Supreme Court of Georgia relied on Van Allen, Lander and Home Savings Bank v. City of Des Moines 205 U.S. 503, 51 LEd 901, 27 Supreme Court 571 in deciding Daniel v. Bank of Clayton County, 154 Ga. 282 (1922).

This Court does not believe that the Congress of the United States would act to sweep away the Van Allen rule and the bank share tax system of the various States without making a clear statement of its intention to do so.

As demonstrated by the cases covered herein the Supreme Court has repeatedly interpreted 31 U.S.C. 742 to mean in connection with taxation of banks, that federal securities are exempt from taxation in the hands of the owner of the securities; and that the bank is the owner

of the security and not a shareholder of the bank.

This Court believes that the correct interpretation of P. L. 86-346 is that the first sentence of 31 U.S. Code 742 extends to every form of taxation of United States securities in the hands of the owners of the securities, including the interest on this securities.

Why did Congress enact P. L. 86-346? to answer this question we must look to the legislative history. This is found in the U. S. Code Congressional and Administrative News for 1959 beginning at Page 2769.

P. L. 86-346 is contained in a bill to permit the issuance of Series E and H U. S. Savings Bonds at interest rates above the then existing maximum. The Summary of the Bill states that it makes a number of changes in laws relating to

bond interest rates and other aspects of debt management. The paragraph specified "Fourth" deal with P. L. 86-346. It reads as follows:

> "Fourth, the bill makes it clear that both the principal and interest on U. S. obligations are exempt from all state taxes except nondiscriminatory franchise, etc., taxes." (Emphasis Supplied)

The Committee on Finance of the Senate evidently felt it should be made clear that interest on U. S. obligations was within the exemption of 31 U.S. Code 742 as well as principal.

At page 2773 of the U. S. Code Congressional and Administrative News is further elucidation of the reason for P.L. 86-346.

> "D. Clarifying exemption of U.S. obligations from State and local taxation. Present law provides that obligations of the United States are to be exempt from

> taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on U. S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing "gross income" upon which taxable net income is determined. The bill (sec. 105) makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligation, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes. (Emphasis supplied)

The intent of the legislation was to demonstrate that interest on U. S. obligations is exempt from Estate taxation just as principal is exempt from taxation under 31 U. S. Code 742.

There is no indication that Congress had any intention to sweep away 96 years of consistent precedent of the U. S. Supreme Court following the Van Allen rule or in one cryptic sentence to bring down the State systems taxing bank shares without deducting federal securities. If Congress had intended such a drastic change in relationship of the States and the Federal Goverment it would have mentioned that it intended to do away with Van Allen and its progeny.

Congress has found that one State had included interest on Federal Securities in "gross income" upon which its taxable net income was determined for State taxation purposes. This is a problem involving an attempt to tax interest in the hands of the owner of the securities. It does not strike at the destinction between the owner of

the securities and the shareholder of shares in the owner of the securities.

This Court has been cited to two decisions of other States which are Montana Bankers Association V. Montana Department of Revenue 580 P. 2d 909 (1978), and Bank of Texas V. John Childs et al. Court of Civil Appeals, Fifth Supreme Judicial District of Texas at Dallas, No. 20660, (1981). In a three to two decision the Supreme Court of Montana ruled that P.L. 86-346 speaks for itself and is clear and unambiguous. The plain language of 1959 amendment is as clear to this Court as the first sentence of 31 U.S. Code 742 which it is intended to supplement. The first sentence says Federal Securities ". . . shall be exempt from taxation" but this means only with regard to the owner of securities. The second sentence says

"this exemption extends to every form of taxation" and reading this in pari materia, it means with regard to the owner of the securities. The purpose of P. L. 86-346 was not to do away with the distinction between bank assets and bank shares but to do away with the distinction between federal obligations and the interest thereon, for State tax purposes.

7.

This Court finds that Section 91A-3301 of the Code of Georgia does not violate 31 U.S. Code 742 as amended nor the Supremacy Clauses of the Constitution of the United States or the Constituion of the State of Georgia, since it is a tax on the value of bank shares in the hands of the shareholders, and is not a tax on federal securities held by the banks.

VERDICT AND JUDGMENT

The Court finds in favor of the Bartow County Board of Tax Assessors and the State Revenue Commissioner of Georgia in all cases and against the banks. In Civil Action File Number 3080 the decision of the Tax Equalization Board is reversed. In Civil Actions Numbered 3081 and 3082 the decision of the Tax Equalization Board is affirmed.

This 22nd day of May, 1981.

s/ TOM POPE
TOM POPE, Judge Superior Court Cherokee Judicial Circuit

DECISION OF
BARTOW COUNTY BOARD OF
EQUALIZATION

Appeal of: C & S BANK
Taxpayer-Appellant

Bank Shares - Federal
Securities

The undersigned members of the Board of Equalization, having heard all evidence and having reviewed all information submitted regarding the appeal to this Board of the assessment of the captioned property, do hereby find the assessed value to be:

Bank Shares total: $287,897

We further find: That Federal Securities are taxable.

Qualification questions answered in affirmative (Regulation 560-11-2-.35);	Yes	s/ Prince Lewis
	Yes	s/ Martha H. Wade
	Yes	s/ Lamar Wade

I, the undersigned member of the County Board of Equalization hereby dissent from the majority decision of this Board because I feel that federal securities are not taxable.

s/ Lamar Wade

Sworn to and subscribed before me this 2 day of October, 1980.

s/ Helen Sweat

DECISION OF
BARTOW COUNTY BOARD OF
EQUALIZATION

Appeal of: The First National Bank of Cartersville
Taxpayer-Appellant

Bank Shares - Federal Securities

The undersigned members of the Board of Equalization, having heard all evidence and having reviewed all information submitted regarding the appeal to this Board of the assessment of the captioned property, do hereby find the assessed value to be:

Bank Shares total: $1,899,371

We further find: That Federal Securities are taxable.

Qualification questions answered in affirmative (Regulation 560-11-2-.35);	Yes	s/ Lamar Wade
	Yes	s/ Martha H. Wade
	Yes	s/ Prince Lewis

I, the undersigned member of the County Board of Equalization hereby dissent from the majority decision of this Board because I feel that federal securities are not taxable.

s/ Lamar Wade

Sworn to and subscribed before me this 2 day of October, 1980.

s/ Helen Sweat

DECISION OF
BARTOW COUNTY BOARD OF
EQUALIZATION

Appeal of: Bartow County Bank
Taxpayer-Appellant

Bank Shares - Federal
Securities

The undersigned members of the Board of Equalization, having heard all evidence and having reviewed all information submitted regarding the appeal to this Board of the assessment of the captioned property, do hereby find the assessed value to be:

Bank Shares total: -0-

We further find: The majority finds that federal securities are not taxable.

Qualification questions answered in affirmative (Regulation 560-11-2-.35);	Yes	s/ Martha H. Wade
	Yes	s/ Lamar Wade
	Yes	s/ E.B. Youngblood

I, the undersigned member of the County Board of Equalization hereby dissent from the majority decision of this Board because I feel that federal securities are not taxable.

s/ Martha H. Wade

Sworn to and subscribed before me this 2 day of October, 1980.

s/ Helen Sweat

In the Supreme Court for the State of Georgia

37868 BARTOW COUNTY BANK V. BARTOW COUNTY BOARD OF TAX ASSESSORS, et al.

37869 THE CITIZENS & SOUTHERN BANK OF BARTOW COUNTY V. BARTOW COUNTY BOARD OF TAX ASSESSORS, et al.

37870 FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA, V. BARTOW COUNTY BOARD OF TAX ASSESSORS, et al.

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE

UNITED STATES

Notice is hereby given that Bartow County Bank, The Citizens and Southern Bank of Bartow County, and First National Bank of Cartersville, Georgia, Appellants in the above cases, hereby

appeal to the Supreme Court of the United States from the judgment in the above styled cases, dated and entered January 6, 1982, which judgment erroneously held that Georgia's Bank Share Tax Act, Ga. Code Ann. Section 91A-3301, Ga. Laws 1978, pp. 309, 523, (which provides for taxation of bank shares based on the net worth of the bank without subtracting the value of Federal securities owned by the bank) is not in contravention of 31 USC Section 742 as amended in 1959 by Public Law 86-346, and does not violate the supremacy clauses of the United States and Georgia constitutions.

This Appeal is taken to the Supreme Court of the United States under 28 USC Section 1257(2) for the reason that the validity of a Georgia statute is drawn in question on the ground of its being repugnant to the Constitution and Laws of

the United States, and the decision below was in favor of its validity.

This February 4th, 1982.

WARREN & WM. MORGAN AKIN,
Attorneys

By: s/ Wm. Morgan Akin
Wm. Morgan Akin,
Attorney for Bartow
County Bank, Appellant

Warren Akin
Wm. Morgan Akin
P. O. Box 527
Cartersville, Georgia 30120
404/382/0780

CRANE, JONES & COX, P. C.

BY: s/ Herbert M. Crane, Jr.
Herbert M. Crane, Jr.,
Attorney for the Citizens
& Southern Bank of Bartow
County, and First National
Bank of Cartersville,
Georgia, Appellants

Herbert M. Crane, Jr.
J. Paul Jones
C. Stephen Cox
P. O. Box 305
Cartersville, Georgia 30120
404/382/3737

CERTIFICATE OF SERVICE

I hereby certify that I am one of the attorneys for Bartow County Bank, appellant herein, that I am a member of the Bar of The Supreme Court of the United States, and that I have this day served a copy of this Notice of Appeal to the Supreme Court of the United States to each party named below, by depositing the same in a United States Post Office or Mail Box, with First Class Postage prepaid, addressed to each counsel of record at his post office address, pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States as follows:

Attorney for State
Revenue Commissioner W.E.
Strickland:

James C. Pratt,
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Attorney for Bartow County
Board of Tax Assessors:

G. Carey Nelson
Nelson & Bradley
P. O. Box 362
Cartersville, Georgia 30120

I further certify that all parties requires to be served have been served.

I further certify that I have this day filed a copy of this Notice of Appeal with the Clerk of Superior Court of Bartow County, Georgia, pursuant to Rule 10.3 of the Rules of the Supreme Court of the United States.

This February 4, 1982.

WARREN & WM MORGAN AKIN,
Attorneys

BY: s/ Wm. Morgan Akin
Wm. Morgan Akin, Attorney
for Bartow County Bank,
Appellant

P. O. Box 527
Cartersville, Ga. 30120
404/382/0780

AFFIDAVIT OF SERVICE

I, Herbert M. Crane, Jr., an attorney in the office of Crane, Jones & Cox, P.C., attorneys of record for the Citizens and Southern Bank of Bartow County and for First National Bank of Cartersville, Georgia, appellants, herein, depose and say that I have this day served a copy of this Notice of Appeal to the Supreme Court of the United States to each party named below, by depositing the same in a United States Post Office or Mail Box, with First Class Postage prepaid, addressed to each counsel of record at his post office address, pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States as follows:

Attorney for State REvenue
Commissioner W. E. Strickland:

James C. Pratt,
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Attorney for Bartow County
Board of Tax Assessors:

G. Carey Nelson
Nelson & Bradley
P. O. Box 362
Cartersville, Georgia 30120

All parties required to be served have been servied.

s/Herbert M. Crane, Jr.
Herbert M. Crane, Jr.

Sworn to and subscribed
before me this 4th day
of February, 1982.

s/Marcia C. Otting
NOTARY PUBLIC, BARTOW CO.,GA.
my commission expires: 5-6-82

ACKNOWLEDGMENT OF SERVICE

I hereby acknowledge service of the Notice of Appeal to the Supreme Court of the United States by Bartow County Bank in Case No. 37868.

This February 4th, 1982.

CRANE, JONES & COX, P. C.

BY: s/ Herbert M. Crane, Jr.
Herbert M. Crane, Jr.,
Attorney for the Citizens and Southern Bank of Bartow County and for First National Bank of Cartersville, Georgia, Appellants

P. O. Box 305
Cartersville, Ga. 30120
404/382/3737

I hereby acknowledge service of the Notice of Appeal to the Supreme Court of the United States by Citizens and Southern Bank of Bartow County and First National Bank of Cartersville, Georgia, in Case Numbers 37869 and 37870.

This February 4, 1982.

WARREN & WM. MORGAN AKIN,
Attorneys

BY: s/ Wm. Morgan Akin
Wm. Morgan Akin, Attorney
for Bartow County Bank,
Appellant

P. O. Box 527
Cartersville, Georgia 30120
404/382/0780

Received by mail and filed: 2/8/82

s/ Ric Diguette
SUPREME COURT OF GEORGIA

Simultaneously filed in Bartow
Superior Court

91A-3301 Banks and banking associations

(a)(1) No tax shall be assessed upon the capital of banks or banking associations organized under the authority of this State or of the United States located within this State, but the shares of the stockholders of the banks or banking associations, whether resident or nonresident owners, shall be returned and taxed at their fair market value which is hereby fixed and shall be determined by adding together the amount of the capital stock, paid-in capital, appropriated retained earnings, and retained earnings as defined in the Financial Institutions Code of Georgia (Title 41A) and as shown on the unconsolidated statement of condition of the bank or banking association as of January 1 next

preceding the date of making the return as required in this section and dividing the result by the number of outstanding shares, at the same rate provided by law for the taxation of tangible personal property in the hands of private individuals.

(2) Nothing in this section shall be construed to relieve a bank or banking association from the tax on real estate held or owned by it. All such real estate shall be returned at its fair market value in the county, municipality, and taxing district where the real estate is located. When real estate is fully paid for, the fair market value at which it is returned for taxation may be deducted from the fair market value of the shares of the bank and banking association. If the real estate is not fully

paid for, only the value at which the equity owned by the bank or banking association in the real estate is returned for taxation shall be deducted from the fair market value of the shares of the bank or banking association. There shall also be deducted from the fair market value of the shares any portion included in the fair market value and representing:

(a) Investments in subsidiary banks which themselves are subject to the tax imposed by this section.

(B) The bank's share of undistributed earnings of such other subsidiaries subject to Georgia corporate taxes.

(C) Capital reserves to the extent that the reserves are not unreasonable.

(b) The banks or banking associations themselves shall make the returns

on or before April 1 of each year of their shares and pay the taxes on the shares as provided in this section. Each bank or banking association which has no branches shall return all of the shares of all stockholders of the bank banking association for taxation in the counties, municipalities, and districts in which the bank or banking association is located. Each bank or banking association which has branches shall return for taxation in the respective counties, municipalities, and districts in which the bank or banking association and its branches are located such proportion of the shares of all stockholders of the bank or banking association as the total deposits on January 1 of each year originating in accounts attributable to each of all such branches and the main

office bear to the grand total of all deposits on January 1 of each tax year of the bank or banking association and shall pay to the respective counties, municipalities, and taxing districts the taxes on such proportions of the shares.

(c) At the time that a bank or banking association makes its tax returns in the counties, municipalities and taxing districts, the bank or banking association shall file with the return a sworn statement showing the total amount of deposits of the bank or banking association on January 1 of the tax year and the amount of the deposits on January 1 of the tax year originating in accounts attribbutable to the main office and attributable to the branch offices of the bank or banking associa-

tion. The taxing authorities of each county, municipality, and taxing district are authorized to examine the books of the bank or banking association to determine the correctness of the sworn statement and may disallow any unreasonable unallocated reserves.

(d) Banks and trust companies doing a general banking business shall not be required to pay any State income tax, State franchise tax, or city or county business license taxes.

(e) When a bank or banking association organized under the authority of this State or of the United States located within this State owns all of of the capital stock of a corporation holding, leasing, or owning premises in and on which the bank carries on its

business and an ad valorem tax is levied on such real estate, the bank or banking association may deduct from the fair market value of its shares the fair market value of its equity in the real estate. The fair market value of the real estate shall be measured by the fair market value of the capital stock of the bank or banking association in the holding corporation.

(f) A transfer by a bank or banking association of deposits from one branch or office to another branch or office to secure a reduction in the rate of tax on its shares or to change the situs of taxation of any proportion of its shares shall be wholly ineffective for such purpose. The bank or banking association making any such transfer shall pay to the county, municipality, and taxing

district from which the transfer was made, in addition to the tax imposed by this section, 25 per cent. of that part of the taxes on its shares which would have been avoided if the transfer had changed the situs of taxation of a proportion of its shares.

(g) No tax shall be assessed, imposed, or levied with respect to tangible personal property owned by any bank or banking association organized under the laws of this State or the United States. (Acts 1978, pp. 309, 523, eff. Jan. 1, 1980).

NOTE: Effective Nov. 1, 1982, this Code Section will become Ga. Code § 48-6-90.

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BARTOW COUNTY BANK, *et al.*,
Appellants,

vs.

BARTOW COUNTY BOARD OF TAX ASSESSORS, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

H. PERRY MICHAEL
Senior Assistant
Attorney General

JAMES C. PRATT
Assistant Attorney General
Attorneys for Appellee
W. E. Strickland, as State
Revenue Commissioner
of Georgia

Please address all
correspondence to:

JAMES C. PRATT
Assistant Attorney General
132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3343

G. CAREY NELSON
STEPHEN R. BRADLEY
Nelson & Bradley
Attorneys for Appellee
Bartow County Board of
Tax Assessors

May 5, 1982

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

MOTION TO DISMISS 1

PRELIMINARY STATEMENT 1

ADDITIONAL STATUTORY PROVISIONS 2

THE QUESTION IS NOT SUBSTANTIAL 4

1. Although a 1978 Montana Decision Was Contrary to the Georgia and Texas Decisions Now Pending in this Court, the Amendment of the Montana Statute in 1979 Obviated any Meaningful Conflict Among the States 4

2. The Decision Below Fully Explored the Question Presented in this Court and Correctly Decided that Congress Did Not Prohibit Bank Share Tax Statutes like Ga. Code § 91A-3301 When It Amended 31 U.S.C. § 742 in 1959 6

a. The Pre-1959 Statutory Background 7

b. The 1959 Amendment to 31 U.S.C. § 742 12

c. The 1969 Amendment to 12 U.S.C. § 548 14

CONCLUSION 17

CERTIFICATE OF SERVICE 18

APPENDIX

TABLE OF AUTHORITIES

Cases **Page**

American Bank and Trust Co. v. Dallas County, No. 81-1717 (U.S., Petition for Cert. filed March 17, 1982) 2 n.1

Bank of Texas v. Childs, 615 S.W.2d 810 (Tex. Civ. App. 1981), No. 81-1717 (U.S., Petition for Cert. filed *sub nom.* March 17, 1982) 15

Bartow County Bank v. Bartow County Board of Tax Assessors, 248 Ga. 703, 285 S.E.2d 920 (1982), No. 81-1834 (U.S., appeal docketed April 5, 1982) 6, 14

Cleveland Trust Co. v. Lander, 184 U.S. 111 (1902) ... 8, 14

First Agricultural National Bank v. State Tax Commission, 392 U.S. 339 (1968) 11 n.6, 12

Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1933) 8-9 n.5

Hicks v. Miranda, 422 U.S. 332 (1975) 6

Macallen Co. v. Massachusetts, 279 U.S. 620 (1929) 9, 10, 11

M'Culloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819) 7 n.3

Montana Bankers Ass'n v. Montana Department of Revenue, 177 Mont. 112, 580 P.2d 909 (1978) 5

National Bank v. Commonwealth, 9 Wall. (76 U.S.) 353 (1869) 7 n.3

National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977) 15

Ohio ex. rel. Eaton v. Price, 360 U.S. 246 (1959) 6

Plummer v. Coler, 178 U.S. 115 (1900) 10, 11, 12

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 13

TABLE OF AUTHORITIES (Continued)

Page

Cases (Continued)

Robertson v. Railroad Labor Board, 268 U.S. 619 (1925) 15

Society for Savings v. Bowers, 349 U.S. 143 (1955) 8, 8-9 n.5, 11

Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976) 13

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 6

United States v. American Trucking Ass'ns, 310 U.S. 534 (1940) 13

United States v. New Mexico, ___ U.S. ___, 50 U.S.L.W. 4326 (March 23, 1982) 7 n.3

United States v. Oregon, 366 U.S. 643 (1961) 5

Van Allen v. Assessors, 3 Wall. (70 U.S.) 573 (1866) ..... *passim*

Werner Machine Co. v. Director of Taxation, 350 U.S. 492 (1956) 12

Statutes

12 U.S.C. § 548 and forerunners ..... *passim*
- Act of June 3, 1864, c. 106, § 41, 13 Stat. 111 ..... 2 n.1, 7, 14
- Act of Feb. 10, 1868, c. 7, 15 Stat. 34 ..... 2 n.1, 7
- Revised Statutes § 5219 (1878) 2 n.1, 7
- 12 U.S.C. § 548 (1926) 2-4, 7, 8, 10, 12, 14
- 12 U.S.C. § 548 (1969) 2, 4, 14, 15, 16

31 U.S.C. § 742 and forerunners ..... *passim*
- Act of Feb. 25, 1862, c. 33, § 2, 12 Stat. 346 ..... 8 n.4
- Revised Statutes § 3701 (1878) 8, 9, 12, 13
- 31 U.S.C. § 742 (1926) 11, 12, 13
- 31 U.S.C. § 742 (1959) ..... *passim*

TABLE OF AUTHORITIES (Continued)

Page

Statutes (Continued)

Act of July 14, 1870, c. 256, 16 Stat. 272 ..... 8 n.4, 11

Act of July 17, 1916, c. 245, 39 Stat. 360 ..... 8 n.4

Act of Sept. 14, 1917, c. 56, 40 Stat. 288 ..... 8 n.4

Act of June 30, 1926, c. 712, § 2(a), 44 Stat. 1 ... 8-9 n.5

Georgia Code § 91A-3301 ..... 6, 7, 9, 13, 16

Mont. Rev. Codes Ann. Ch. 84-46 (1947) 5

Mont. Rev. Codes Ann. Ch. 15-31, 1979 Mont. Laws 1729 5

Constitutions

U.S. Const. Art. I, § 8, cl.2 ..... 7 n.3

Other Materials

T. Cooley, *The Law of Taxation*, (4th Ed. 1924) 7 n.3

"Public Debt Ceiling and Interest Rate Ceiling on Bonds," Hearings before the Committee on Ways and Means, House of Representatives, 86th Cong. 1st Sess. 69-72 (1959) (pages pertaining to proposed amendment of R.S. § 3701 (31 U.S.C. § 742)) ..... 13, Appendix

Harlan, J., "Some Aspects of the Judicial Process in the Supreme Court of the United States," 33 AUSTRALIAN L.J. 108 (1959) 5-6

R. Stern and E. Gressman, *Supreme Court Practice* (5th ed. 1978) 5 n.2

U.S. Code Cong. & Ad. News, 1959 ..... 8-9 n.5

NO. 81-1834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BARTOW COUNTY BANK, *et al.*,
Appellants,

vs.

BARTOW COUNTY BOARD OF TAX ASSESSORS, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS

Appellees respectfully move the Court to dismiss the appeal herein for want of a substantial federal question, on the ground that the question presented was fully explored and correctly decided below and does not need further argument.

PRELIMINARY STATEMENT

The Board concurs in the Question Presented, the List of All Parties, the Opinions Below, and the Statement of Jurisdiction as presented by the Appellant Banks. The Board concurs in the Banks' Statement of the Case except that its first paragraph characterizes the law governing this appeal and the Board disputes the correctness of the characterization.

ADDITIONAL STATUTORY PROVISIONS

The Banks' list of Constitutional and Statutory Provisions does not include 12 U.S.C. § 548 and its forerunner enactments, provisions relied upon by the Board and by the Georgia Supreme Court. The directly relevant enactments are as follows:[1]

12 U.S.C. § 548 (1926)

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in

---

[1] The Petition for a Writ of Certiorari in *American Bank and Trust Co., et al. v. Dallas County, et al.*, No. 81-1717 (filed March 17, 1982) [herein "Texas Petition"], presenting the precise issue presented here, also includes earlier forerunners of 12 U.S.C. § 548 at 53a-55a.

competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same

extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. R.S. § 5219; Act of Mar. 4, 1923, c. 267, 42 Stat. 1499; Act of Mar. 25, 1926, c. 88, 44 Stat. 223.

12 U.S.C. § 548 (1969)

For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located. Pub.L. 91-156, §§ 1(a), 2(a), 83 Stat. 434.

THE QUESTION IS NOT SUBSTANTIAL

While the Banks' Jurisdictional Statement states that the question presented herein is substantial for various reasons, a close examination establishes that it does not merit plenary review by this Court. There is no present substantial conflict among the States with respect to this issue, and the analysis and decision of the court below are clearly correct.

1. Although a 1978 Montana Decision Was Contrary to the Georgia and Texas Decisions Now Pending in this Court, the Amendment of the Montana Statute in 1979 Obviated any Meaningful Conflict Among the States.

Both the Banks and the Texas Petitioners urge "conflict among the States" as a basis for plenary review of the

pending cases by this Court. While conflict among the decisions of the highest courts of two or more States often justifies Supreme Court review, *e.g.*, *United States v. Oregon*, 366 U.S. 643, 645 (1961), this case is different from the typical case involving conflicting decisions because here there is no inconsistent administration of the law.

The Banks base their allegation of a conflict on *Montana Bankers Association v. Montana Department of Revenue*, 177 Mont. 112, 580 P.2d 909 (1978). *Montana Bankers Association* construed Montana's then effective bank share tax statute, Mont. Rev. Codes Ann. Ch. 84-46 (1947), to permit a deduction for federal securities held by banks, and invalidated contrary regulations. Less than a year after the decision was announced the Montana legislature replaced the bank share tax statute with a statute providing for a franchise tax measured by net income. Mont. Rev. Codes Ann. Ch. 15-31, 1979 Mont. Laws 1729. Thus, while *Montana Bankers Association* remains as a physical precedent in Montana, it ceased to have any practical effect when the Montana bank share tax statute was repealed.

In this situation it would be appropriate for this Court to adopt Mr. Justice Harlan's formulation, stated in the certiorari context in "Some Aspects of the Judicial Process in the Supreme Court of the United States," 33 AUSTRALIAN L.J. 108 (1959):

> [E]ven where a "true" conflict may be said to exist, certiorari will sometimes be denied . . . where the impact of the conflict is narrowly confined and is not apt to have continuing future consequences, as where a statute which has given rise to conflicting interpretations has been repealed or is about to expire.[2]

[2] Quoted in R. Stern and E. Gressman, *Supreme Court Practice* 266 (5th ed. 1978).

The instant situation is of course not identical to the situation contemplated by Justice Harlan: the perfect illustration of Justice Harlan's point would be a petition for review after the second sentence of 31 U.S.C. § 742 had been repealed. Nevertheless, the force of Justice Harlan's reasoning is applicable here, because the amendment of the Montana statute destroyed the immediate consequences of the Montana decision and narrowly confines the impact of any state court conflict.

The fact that this case is an appeal, rather than a petition for a writ of certiorari, also supports a summary disposition. The appropriateness of plenary review is usually determined by factors which apply equally to appeals and reviews by certiorari, *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959) (Brennan, J.), but in this case the two are not the same. A summary dismissal of the pending appeal, unlike the denial of certiorari, will resolve any State court inconsistency in this area, *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), obviating any doubt which might otherwise arise in other States. Accordingly, the existence of the Montana decision offers no solid basis for noting probable jurisdiction in the case at bar.

2. The Decision Below Fully Explored the Question Presented in this Court and Correctly Decided that Congress Did Not Prohibit Bank Share Tax Statutes like Ga. Code § 91A-3301 When It Amended 31 U.S.C. § 742 in 1959.

The thorough and able opinion of the Georgia Supreme Court, Juris. St. 1a-28a, provides a sound basis for this Court to dismiss the pending appeal summarily, on the ground that no substantial federal question is presented. A review of the applicable statutes and decisions of this

Court establishes that the decision below correctly held that Ga. Code § 91A-3301 and the Georgia bank share tax are consistent with federal law.

a. The Pre-1959 Statutory Background

Congress may prohibit the method of taxation embodied in Ga. Code § 91A-3301, or Congress may permit such taxation.[3] This case therefore presents a question of statutory construction, and requires an understanding of the history of enactments governing bank share taxes and State taxation of federal obligations.

In 1864 Congress decided to permit states to tax shares of national banks, and to do so without making any deduction on account of federal securities held by the banks. The National Bank Act of 1864, c. 106, § 41, 13 Stat. 111, (amended in 1868, 15 Stat. 34, restated in 1878, R.S. § 5219, and in 1926, 12 U.S.C. § 548); *Van Allen v. Assessors*, 3 Wall. (70 U.S.) 573 (1866); *National Bank v. Commonwealth*, 9 Wall. (76 U.S.) 353 (1869). Congress'

---

[3] Intergovernmental tax immunity has a constitutional dimension, *M'Culloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819), but in this context the authority of Congress has been unquestioned since *National Bank v. Commonwealth*, 9 Wall. (76 U.S.) 353 (1869). Judge Cooley stated the basis for allowing Congress to determine this question as follows:

> But the sovereignty in whose interest the exemption exists is fully protected if it controls in respect to taxation; and it may, in its discretion, permit its own agencies or its own property to be taxed by the other, under limitations prescribed by itself . . . . T. Cooley, 2 *The Law of Taxation* § 606, at 1287 (4th Ed. 1924).

The Banks' reference to the Borrowing Clause, Juris. St. 12, therefore adds no force to its statutory argument. *Cf. United States v. New Mexico*, ___ U.S. ___, 50 U.S.L.W. 4326 (March 23, 1982). The Texas Petition also relies upon the Borrowing Clause, but principally in the context of an alleged discrimination that is not present in the case at bar. *See* Texas Petition 14-15.

decision was later held applicable to state taxation of shares in state chartered institutions. *Cleveland Trust Co. v. Lander*, 184 U.S. 111 (1902). Congress revised and refined its consent over the course of the century following 1864, and a detailed jurisprudence was developed to regulate state taxation of bank shares, but the basic decision to permit such taxation, without deducting the value of federal securities held by banks, was not reopened. *See Society for Savings v. Bowers*, 349 U.S. 143 (1955).

Starting no later than 1862, Congress routinely inserted exemption language in statutes authorizing the United States to issue bonds and otherwise incur debt.[4] Moreover, § 3701 of the Revised Statutes of 1878 provided a general exemption, applicable to all federal obligations, in the following terms:

> All stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under State or municipal or local authority.

In 1926 the general exemption was included verbatim in the United States Code, 31 U.S.C. § 742, preceded by the phrase "Except as otherwise provided by law . . . ." The introductory phrase was inserted by the revisers and serves notice that the exemption must be read in the context of other provisions, notably 12 U.S.C. § 548, with its authorization of state taxation of bank shares.[5]

---

[4] *E.g.* Act of Feb. 25, 1862, c. 33, 12 Stat. 345, 346; Act of July 14, 1870, c. 256, 16 Stat. 272, 272; Act of July 17, 1916, c. 245, 39 Stat. 360, 380; Act of Sept. 24, 1917, c. 56, 40 Stat. 288, 291.

[5] The Banks suggest that the introductory phrase should be disregarded because Title 31 is one of the unenacted titles of the United States Code. Juris. St. 13. The Board submits that the introductory phrase is authoritative, because the Code as a whole was enacted by Congress as prima facie evidence of the law, and may be rebutted only if shown to be in error. Act of June 30, 1926, c. 712, § 2(a), 44

The text of R.S. § 3701 made no exception for state taxation of bank shares. However, following the settled jurisprudence of *Van Allen* and its progeny, the Banks concede that during this period bank share taxes were not required to make any deduction or other allowance for federal securities held by banks. Juris. St. 14.

Despite the Banks' concession that bank share taxes were valid prior to 1959, the Banks and the Board disagree on why this was so. In order to lay a foundation for their interpretation of Pub. L. 86-346, 73 Stat. 622, the 1959 amendment to 31 U.S.C. § 742 upon which they principally rely, the Banks assert that prior to 1959 the general exemption statute only "prohibited taxes *upon* federal securities." Juris. St. 17 (emphasis in original); *see also* Texas Petition 11, 13. The Banks' position evidently is that bank share taxes and other taxes which indirectly affect federal securities were upheld from 1862 to 1959 solely because the exemption statute failed to stipulate that both direct and indirect state taxes on federal securities were prohibited.

The Banks' position is based upon a misreading of *Van Allen v. Assessors*, 3 Wall. (70 U.S.) 573 (1866). First, as the opinion in *Van Allen* and *Macallen Co. v. Massa-*

Stat. 1. The introductory phrase codifies the rule of *Van Allen v. Assessors*, 3 Wall. (70 U.S.) 573 (1866), and therefore cannot be excised on the ground that it improperly altered the meaning of R.S. § 3701. As this Court held in *Guaranty Trust v. Blodgett*, 287 U.S. 509, 513 (1933), controlling judicial constructions are as effectual "as though the meaning as fixed by the Court had been expressed in the statute itself in specific words." These considerations may explain why this Court and the Congress have both included the introductory phrase when quoting the law in this area. *See Society for Savings v. Bowers*, 349 U.S. 143 (1955); 2 1959 U.S. Code Cong. & Ad. News 2777. For reasons discussed *infra* pp. 12-14, however, both the Superior Court and the Georgia Supreme Court concluded that Ga. Code § 91A-3301 was valid irrespective of the status of the introductory phrase of 31 U.S.C. § 742. Juris. St. 30a, 39a.

chusetts, 279 U.S. 620 (1929), both make clear, Congress specifically consented to state taxation of bank shares without deducting the value of federal securities held by banks. Second, *Plummer v. Coler*, 178 U.S. 115 (1900), discredits the Banks' attempt to focus on whether an exemption statute contains a "direct or indirect" stipulation.

Despite the Banks' assertion to the contrary, *Van Allen* did not simply affirm a distinction between the capital of a bank and its shares. Prior to discussing any such distinction, this Court held that Congress' specific consent to state taxation of "all the shares" of a bank authorized state taxation of the shares without making any deduction for federal securities held by the bank. *Van Allen, supra*, 3 Wall. (70 U.S.) at 583, 585.

That the Banks have misread *Van Allen* is confirmed by *Macallen Co. v. Massachusetts*, 279 U.S. 620 (1929). In *Macallen* this Court recognized the special status conferred by Congress upon state taxes authorized by 12 U.S.C. § 548. Macallen Company, a business corporation, successfully protested the levy of an excise tax based partly on net income on the ground that some of its income was derived from exempt federal securities. Massachusetts argued that its tax should be upheld on the ground that it was no different from a tax which was valid for national banks. This Court distinguished the two taxes, not because the bank tax was less direct than the Massachusetts excise tax, and not because one considered federal securities differently from the other in computing the tax, but because 12 U.S.C. § 548 did not apply to a business corporation:

> It is clear that authority, even if given, to impose a tax on federal bonds in the case of national banks

> does not include, by implication or otherwise, the authority to impose a tax upon such bonds held by ordinary corporations. 279 U.S. at 634.[6]

Thus, *Macallen* confirms that the validity of bank share taxes did not turn on the fact that they taxed federal securities only indirectly, but was also attributable to the consent of Congress.

Plummer v. Coler, 178 U.S. 115 (1900), makes it clear that microscopic analysis of particular exemption language is an unreliable guide to meaning in this area. In *Plummer* this Court considered a challenge to a state inheritance tax on the ground that it taxed a legacy consisting of exempt United States bonds. The bonds in question were exempted from "taxation in any form by or under State, municipal or local authority." Act of July 14, 1870, c. 256, § 1, 16 Stat. 272, 272.

Counsel for the taxpayer relied heavily upon the exceptional breadth of the exemption conferred by this particular Act. This Court, however, refused to attribute special significance to the Act's "in any form" stipulation, noting that to do so would require the overruling of earlier cases sustaining corporate franchise taxes and taxes upon property transfers at death. *Plummer*, *supra*, 178 U.S. at 135. *Plummer* therefore undercuts completely the Banks' position that survival of the *Van Allen* rule depended upon the absence of a "direct or indirect" stipulation in 31 U.S.C. § 742.

---

[6] As the "even if given" language implies, the *Macallen* Court could and did leave open the question whether a bank excise tax based upon federal securities' income could be authorized by Congress. Later cases have affirmed Congress' authority in this regard. *See First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 346 (1968).

b. The 1959 Amendment to 31 U.S.C. § 742

In 1959 Congress added a second sentence to R.S. § 3701 and 31 U.S.C. § 742, to read as follows:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes. Pub. L. 86-346, 73 Stat. 622.

A close examination of the 1959 Amendment establishes that it clarified rather than changed Congress' longstanding judgment concerning state taxation of federal securities.

The general language of the Amendment is broad, to be sure, and in form reaches all state taxes that consider federal securities' values or interest in the computation of the tax. However, R.S. § 3701 was also unrestricted, applying to "all . . . obligations of the United States" and providing simply that they "shall be exempt from taxation" by States and localities. Moreover, prior exemptions prohibiting state taxes "in any form" had not been construed to be any broader than R.S. § 3701. *See Plummer v. Coler*, 178 U.S. 115 (1900).

The remainder of the Amendment, consisting of its exceptions for corporate franchise, estate and inheritance taxes, was also old news, the propriety of such taxes having been settled despite the absence of limiting language in R.S. § 3701. *See Werner Machine Co. v. Director of Taxation*, 350 U.S. 492 (1956); *Plummer v. Coler*, 178 U.S. 115 (1900); *see also First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 346 (1968) (Noting that since 1926, 44 Stat. 223, States have been authorized

to levy on national banks franchise and excise taxes measured by net income, including income of federal securities).

Read as a whole, the Amendment simply restated the prior law, and mandated no change in what previously had been proper state tax practice. Indeed, the opening reference to "this exemption" suggested that what was to follow would clarify rather than alter what had gone before.

The legislative history of the 1959 Amendment confirms that it was a minor measure aimed at a modest goal. The legislation was sponsored by the Department of the Treasury to resolve its dispute with the State of Idaho over Idaho's indirect taxation of the income of federal securities held by individuals. The Department was sure that its position, that such taxation was improper, was correct under existing authorities, but felt it would be less troublesome to amend R.S. § 3701 than to resolve the dispute through litigation. *See* "Public Debt Ceiling and Interest Rate Ceiling on Bonds," Hearings before the Committee on Ways and Means, House of Representatives, 86th Cong., 1st Sess. 69-72 (1959), attached hereto as an Appendix.

Considering the 1959 Amendment in the light of the legislative history, the text of 31 U.S.C. § 742 taken as a whole, and established canons of statutory construction, it is clear that the Amendment did not invalidate bank share taxes such as Ga. Code § 91A-3301. *See Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 16 (1976); *United States v. American Trucking Associations*, 310 U.S. 534, 542-4 (1940). The Georgia Supreme Court concluded its analysis of the 1959 Amend-

ment succinctly and correctly, as follows:

> We can say with confidence that had this case arisen before the authorization of 12 U.S.C. § 548 was amended in 1969, the Supreme Court of the United States would have said: The answer to the banks' contention is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by the Court, of the bank and its shareholders, and seeks to nullify one provision of the statutes (R.S. § 5219; 12 U.S.C. § 548) by another (R.S. § 3701; 31 U.S.C. § 742), between which there is no want of harmony. Cleveland Trust Co. v. Lander, supra, 184 U.S. at 115. Juris. St. 22a.

There remains only a secondary argument, advanced by the Texas Petition 13-14 but not by the Banks' Jurisdictional Statement. It concerns the 1969 amendment to 12 U.S.C. § 548.

c. The 1969 Amendment to 12 U.S.C. § 548

As we have seen, one of the reasons States can tax bank shares without deducting the value of federal securities held by banks is because Congress has consented to such taxation. *Van Allen v. Assessors*, 3 Wall. (70 U.S.) 573 (1866); *Cleveland Trust Co. v. Lander*, 184 U.S. 111 (1902). From 1864 to 1973 Congress also placed mechanical restrictions on the power of States to tax national banks. These restrictions engendered continual litigation and several Congressional amendments. Thus, while in 1864 States were limited to share taxes and real property taxes, by 1926 States could choose from among four methods besides real property taxes. *See* 12 U.S.C. § 548 (1926), *supra*, p. 2. To these methods Congress in 1969 added, as a transitional measure, sales taxes and real estate transfer taxes. In 1973, when the 1969 legislation became fully effective, all mechanical restrictions on State

taxation of national banks were dropped in favor of a simple nondiscrimination standard. *See* 12 U.S.C. § 548 (1969), *supra*, p. 4.

Congress' decision to open up new methods of taxation logically should have no effect on the validity of a tax in a State which chooses to adhere to the original authorized method. If the Banks plan to argue that Congress in 1969 intended to depart from its long-settled policy concerning share taxes, they are required by *Robertson v. Railroad Labor Board*, 268 U.S. 619 (1925), to show that such was the case. There is absolutely nothing in the extensive 1969 legislative history to evidence any such intent. *See Bank of Texas v. Childs*, 615 S.W.2d 810, 823-6 (Tex. Civ. App. 1981).

The Banks' argument in essence would be that the 1959 Amendment to 31 U.S.C. § 742, even if it did not invalidate the Georgia statute upon passage, somehow changed its meaning in 1969 and now gives them their victory. This argument ignores the settled principle that statutes are to be construed with reference to the circumstances existing at the time of their passage, rather than with reference to subsequent events. The Court of Appeals for the District of Columbia Circuit stated this principle in *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), as follows:

> As the Supreme Court recognized in *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 1358, 8 L.Ed. 2d 590 (1961), the history of subsequent legislative activity is not useful in determining the meaning of the original legislation when enacted. 'Statutes are construed with the reference to the circumstances existing at the time of passage.' *Id.* Otherwise, the meaning of a statute might never be settled, even though the statutory language had never been

> changed or reenacted with a different intent. 555 F.2d at 952n.41.

By referring to the post-1969 version of 12 U.S.C. § 548 the Texas Petition in effect argues that the meaning of 31 U.S.C. § 742 changed in 1969, a year in which 31 U.S.C. § 742 was not amended or even reenacted without change by the Congress. This argument should be rejected. Acts of Congress are not chameleons, unconsciously changing color with every change in the surrounding landscape. It follows that Ga. Code § 91A-3301 and the Georgia bank share tax remain fully valid and enforceable.

CONCLUSION

For the reasons stated we urge the Court to dismiss the appeal in this case on the ground that it presents no substantial federal question.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

H. PERRY MICHAEL
Senior Assistant
Attorney General

JAMES C. PRATT
Assistant Attorney General
Counsel for Appellee
W. E. Strickland, as State Revenue Commissioner of Georgia

G. CAREY NELSON

STEPHEN R. BRADLEY
Counsel for Appellee
Bartow County Board of Tax Assessors

May 5, 1982

Please address all correspondence to:

JAMES C. PRATT
Assistant Attorney General
132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3343

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Motion to Dismiss upon counsel for opposing parties, pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, by mailing three copies to each in envelopes addressed to:

WM. MORGAN AKIN, ESQ.
Law Offices, Warren & Wm. Morgan Akin
P. O. Box 527
Cartersville, Georgia 30120, and

HERBERT M. CRANE, JR., ESQ.
Crane, Jones & Cox, P.C.
13 South Erwin Street
Cartersville, Georgia 30120,

with first class postage prepaid. All parties required to be served have been served.

This ____ day of _____, 1982.

_____
JAMES C. PRATT
Assistant Attorney General

132 State Judicial Bldg.
Atlanta, Georgia 30334
(404) 656-3343

PUBLIC DEBT CEILING AND INTEREST RATE CEILING ON BONDS

HEARINGS

BEFORE THE

COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES

EIGHTY-SIXTH CONGRESS
FIRST SESSION

ON

REQUEST OF THE PRESIDENT FOR AN INCREASE IN THE CEILING OF THE PUBLIC DEBT AND FOR REMOVAL OF THE INTEREST RATE CEILING ON SAVINGS BONDS AND NEW TREASURY BOND ISSUES

JUNE 10, 11, AND 12, 1959

Printed for the use of the Committee on Ways and Means

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1959

41950

Section 5 of the bill would amend section 3701 of the Revised Statutes (31 U.S.C. 742) to clarify the exemption it accords to the interest on obligations of the United States from State and local income taxes.

Section 3701 of the Revised Statutes provides that obligations of the United States shall be exempt from taxation by or under State or local authority. The Supreme Court of the United States has held that this provision also exempts the interest on obligations of the United States from taxation by or under State or local authority (*N. J. Realty Title Ins. Co. v. Div. of Tax Appeals* (1950), 338 U.S. 665).

In recent years the State of Idaho has taken the position that its income tax law enacted in 1933 has required the inclusion of interest on obligations of the United States in computing gross income (from which taxable net income was determined), and that the Federal statutes have not precluded this requirement. The Idaho statute provided that there shall be levied "upon every individual . . . a tax which shall be according to and measured by his net income." The term "gross income" (from which taxable net income was determined) was defined to include, among other items, "all interest received from federal, state, municipal or other bonds." The law elsewhere provided, however, that "all income, except . . . income not permitted to be taxed under . . . the constitution or laws of the United States, shall be included and considered in determining net income of taxpayers."

It has apparently been the position of the State of Idaho not that the Federal Government is without power to exempt the interest on its obligations from State income taxes, but rather that it has not exempted that interest from a tax such as the Idaho tax.

The reasoning of the Idaho authorities appears to have been as follows: The Federal statute has exempted the interest on Federal obligations from State taxation, and the State tax statute excluded income not permitted to be taxed by the Federal exempting statute, but the Idaho statute did not attempt to tax this income. Rather it carefully provided that there should be levied "upon every individual . . . a tax . . . measured by his net income." Apparently their position has been that this has a different effect from the State statute before 1933, which provided that there should be levied "upon the net income of every individual . . . a tax," which was therefore a tax not permitted under the Federal exempting statute.

The Treasury and the Department of Justice have felt that the position of the State of Idaho rests upon a distinction of words which is without substance. We have not, however, been able to persuade the Idaho authorities to change their position. Since this position does not rest upon a theory of lack of Congressional power to exempt interest on Federal obligations from a tax such as Idaho has had, but rather upon the theory that Congress has not exercised its power, the Treasury and the Department of Justice believe that the simplest resolution of the matter would be through Congressional action which would clarify the exemption by expressly exempting Federal obligations and the interest on them from every form of State and local income taxes. The proposed provision would accomplish that purpose.

It should be mentioned that on March 20, 1959, the State of Idaho adopted a new income tax law. The new

law declares it to be its intent to impose a tax identical as far as possible to the income tax imposed by the Federal Internal Revenue Code. Since the Federal Internal Revenue Code imposes a tax "on the taxable income of every individual" it has been suggested that Idaho may no longer attempt to maintain its position that the Federal exemption statute does not extend to its income tax. We have communicated with responsible State authorities, however, and have been unable to obtain assurances that the State will discontinue requiring the inclusion of interest on obligations of the United States in computing State income taxes.

In these circumstances, we believe it to be highly desirable for the Congress to make the exemption statute more specific at this time. If positions such as Idaho has held are adopted by other States the resulting taxation could have a serious adverse effect on the sale of United States savings bonds, which are so widely held by individuals, and could have undesirable effects on Treasury financing operations in general.

Supplemental Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
OCT 13 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BARTOW COUNTY BANK, *et al.*,
Appellants,

vs.

BARTOW COUNTY BOARD OF TAX ASSESSORS, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

VERLEY J. SPIVEY
Senior Assistant
Attorney General

JAMES C. PRATT
Assistant Attorney General
Attorneys for Appellee W. E. Strickland, as State Revenue Commissioner of Georgia

G. CAREY NELSON
STEPHEN R. BRADLEY
Nelson & Bradley
Attorneys for Appellee Bartow County Board of Tax Assessors

Please address all correspondence to:
JAMES C. PRATT
Assistant Attorney General
132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3337

October 8, 1982

TABLE OF CONTENTS

Page

Table of Authorities i

Preliminary Statement 1

Argument 2

1. Reversal Of The Pending Bank Share Tax Cases Would Not Enhance The Borrowing Power Of The United States 2

2. Plenary Review Of The Pending Bank Share Tax Cases Is Not Necessary To Resolve A Conflict Among The Decisions Of State Courts 3

Conclusion 5

Certificate of Service 7

TABLE OF AUTHORITIES

Cases

American Bank and Trust Co. v. Dallas County, No. 81-1717 (U.S., Petition for Cert. filed March 17, 1982) 1,4,5

First Agricultural National Bank v. State Tax Commission, 492 U.S. 339 (1968) 2

Hicks v. Miranda, 422 U.S. 332 (1975) 4

Montana Bankers Ass'n v. Montana Department of Revenue, 177 Mont. 112, 580 P.2d 909 (1978) 3

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 4

Statute

1979 Mont. Laws 1729 3

NO. 81-1834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BARTOW COUNTY BANK, *et al.*,
Appellants,

vs.

BARTOW COUNTY BOARD OF TAX ASSESSORS, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS

PRELIMINARY STATEMENT

On or about the first of October the United States as *amicus curiae* filed a brief (herein "U.S. Brief") in *American Bank and Trust Company, et al., v. Dallas County, et al.*, No. 81-1717 (Petition for Cert. filed March 17, 1982), urging the grant of certiorari on one of the two grounds raised in the petition. The position taken by the United States may affect the disposition of the Motion to Dismiss filed in this case. Therefore, a supplemental brief is hereby submitted pursuant to Rule 16.6 of the rules of this Court.

ARGUMENT

1. REVERSAL OF THE PENDING BANK SHARE TAX CASES WOULD NOT ENHANCE THE BORROWING POWER OF THE UNITED STATES

The United States in its brief states that, according to the Treasury Department, resolution of the issue presented by the pending Texas and Georgia bank share tax cases "will have a significant impact upon the borrowing power of the United States." U.S. Brief at 7. This statement is based upon the erroneous assumption that the seven states which currently levy bank share taxes would continue to do so were this Court to decide in favor of the banks. If, however, the seven share tax states were to shift to franchise or excise taxes measured by net income, then the marketability of United States obligations would probably not be enhanced and might even be reduced, because franchise and excise taxes measured by net income may include the income earned by U.S. obligations in the tax base. *See First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 346 (1968).[1]

In light of the severe impact of an adverse decision in this Court upon the revenue generated by a bank share tax,[2] the probability of a change to another method of

[1] Whether a shift from share taxation to franchise or excise taxation would raise or lower the indirect state tax burden on United States obligations will depend upon various factors, chiefly the rate of taxation. For example, a franchise tax of 2% of income might enhance the marketability of federal securities vis-a-vis the prior share tax while 4% might reduce marketability. In today's era of severe financial pressures upon states, the prospect of rates low enough to enhance the marketability of federal securities must be close to zero.

[2] The record in this case will show that two of the three appellants would have their taxes wiped out entirely, while the third would have its taxes reduced by more than 88%. The situation in Texas appears to be similar. *See* U.S. Brief at 4 n.4.

taxation is overwhelming. Indeed, the State of Montana shifted from a share tax to a franchise tax measured by net income (the dominant method of bank taxation by states) within months of the decision in *Montana Bankers Ass'n v. Montana Department of Revenue*, 177 Mont. 112, 580 P.2d 909 (1978). *See* 1979 Mont. Laws 1729. Georgia and the other current share tax states could eliminate even a short dislocation by enacting franchise taxes to become effective immediately if their share tax statutes are invalidated.

Therefore, the Treasury Department is dreaming when it predicts that a decision in favor of the banks in these cases will enhance the marketability of U.S. obligations. Because of appeals and refund claims, invalidation of the share tax will have a substantial impact on liability for taxes accrued in prior years, leaving Georgia's banks in the windfall position of paying only minimal state taxes, except real property taxes, for several years. However, since a change in bank tax liability will not alter the interest rates on outstanding obligations, the cost of borrowing to the United States will be affected not at all.

2. PLENARY REVIEW IN THE PENDING BANK SHARE TAX CASES IS NOT NECESSARY TO RESOLVE A CONFLICT AMONG THE DECISIONS OF STATE COURTS

The United States suggests that the pending Georgia and Texas cases present a conflict among the decisions of State courts because they conflict with the prior decision of the Montana Supreme Court in *Montana Bankers Ass'n v. Montana Department of Revenue, supra.* The United States acknowledges that the Montana statute has been changed, U.S. Brief at 7, a point that the Motion to Dis-

miss argued should weigh against plenary review of the pending cases.

In apparent response to the Motion to Dismiss, the United States argues that a conflict among the States still should be deemed to exist, because:

> "The decisions of the Montana Supreme Court will, however, presumably be invoked in the five states other than Texas and Georgia that retain taxes specifically on bank shares. U.S. Brief at 7 (footnote omitted).

This would be a good argument if the issue were presented to this Court solely in the context of a Petition for Certiorari, but that is not the case here. Denial of certiorari in *American Bank and Trust Company*, coupled with a dismissal in this case for want of a substantial federal question, will not leave the remaining five states in a position of uncertainty. This is because such a dismissal in this case will be a ruling upon the merits, and will bind state courts and lower federal courts. *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

CONCLUSION

For the reasons stated above and in the Motion to Dismiss, we urge the Court to dismiss the appeal for want of a substantial federal question and deny the Petition for a Writ of Certiorari in *American Bank and Trust Co. v. Dallas County, supra.*

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

VERLEY J. SPIVEY
Senior Assistant Attorney General

JAMES C. PRATT
Assistant Attorney General

Attorneys for Appellee W. E. Strickland, as State Revenue Commissioner of Georgia

G. CAREY NELSON

STEPHEN R. BRADLEY
NELSON & BRADLEY
Attorneys for Appellee Bartow County Board of Tax Assessors

Please address all
correspondence to:

JAMES C. PRATT
Assistant Attorney General
132 State Judicial Bldg.
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3337

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Supplemental Brief in Support of Motion to Dismiss upon counsel for opposing parties, pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, by mailing three copies to each in envelopes addressed to:

WM. MORGAN AKIN, ESQ.
Law Offices, Warren & Wm. Morgan Akin
P. O. Box 527
Cartersville, Georgia 30120, and

HERBERT M. CRANE, JR., ESQ.
Crane, Jones & Cox, P.C.
13 South Erwin Street
Cartersville, Georgia 30120,

with first class postage prepaid. In addition, a courtesy copy has been mailed to:

HON. REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530

All parties required to be served have been served.

This ____ day of _____, 1982.

_____
JAMES C. PRATT
Assistant Attorney General

132 State Judicial Bldg.
Atlanta, Georgia 30334
(404) 656-3337